

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No. 79506-1

~~IN THE SUPREME COURT OF THE STATE OF WASHINGTON~~
2001 DEC 13

BY RONALD R. CARPENTER

CLERK

SUSAN E. RIVAS,
Plaintiff/Petitioner,

vs.

OVERLAKE HOSPITAL MEDICAL CENTER; OVERLAKE
INTERNAL MEDICINE ASSOCIATES,
Defendants,

and

EASTSIDE RADIOLOGY ASSOCIATES; OVERLAKE IMAGING;
WASHINGTON IMAGING SERVICES,
Defendants/Respondents,

and

ROBERT L. DAVIDSON, M.D. and JANE DOE DAVIDSON, his wife,
and the marital community thereto,
Defendants,

and

ALLAN MURAKI, M.D. and JANE DOE MURAKI, his wife, and the
marital community thereof,
Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

Bryan P. Harnetiaux
WSBA No. 05169
517 E. 17th Avenue
Spokane, WA 99203
(509) 624-3890

Sarah C. Schreck
WSBA No. 39417
828 W. Cliff Dr. #1
Spokane, WA 99204
(509) 475-4462

On Behalf of
Washington State Trial Lawyers Association Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (“WSTLA Foundation”) is a not-for-profit corporation organized under the laws of the State of Washington, and a supporting organization of the Washington State Trial Lawyers Association (“WSTLA”). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress, including the right of such persons to proper application of Washington’s tolling statute, RCW 4.16.190.¹

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal is about the interplay between Washington’s tolling statute, RCW 4.16.190, and the guardianship statutes in Ch. 11.88 RCW. At issue is the extent to which the guardianship statutes are incorporated into and influence application of the tolling statute.

Susan E. Rivas (Rivas) brought this medical negligence action against defendants Eastside Radiology Associates, Overlake Imaging, Washington Imaging Services, and Allan Muraki, M.D. and Jane Doe Muraki (“Muraki”), and others, for injuries sustained as a result of a renal angioplasty performed on her. See Rivas v. Eastside Radiology Assocs.,

¹ WSTLA Foundation filed an amicus curiae memorandum in support of the petition for review in this case. See WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION AMICUS CURIAE MEMORANDUM SUPPORTING REVIEW, dated February 8, 2007. Then co-counsel for WSTLA Foundation on this amicus curiae memorandum, Debra L. Stephens, later withdrew from this case. See Notice of Intent to Withdraw (May 7, 2007). Judge Stephens currently serves on the Court of Appeals, Division III, and will be sworn in as a member of this Court in early January, 2008.

134 Wn.App. 921, 923-24, 143 P.3d 330 (2006), *review granted*, 161 Wn.2d 1007 (2007). All defendants except Muraki have been dismissed. See Rivas, 134 Wn.App. at 924 n.1. Rivas was hospitalized in an intensive care unit for four days after this medical procedure. She sued Muraki et. al three years and two days after the renal angioplasty.

Muraki moved for summary judgment of dismissal, contending that the action was untimely under RCW 4.16.350, the medical negligence statute of limitations. Rivas countered that the limitation period was tolled under RCW 4.16.190 because she was incompetent or disabled during the four-day period following surgery, and, as a consequence, her action was timely. Rivas at 924-27; see also Rivas Br. at 2, 6. The superior court concluded the tolling statute applied, and that there was a genuine issue of material fact whether Rivas was incapacitated at the time her cause of action accrued. Id. at 924-25.

Muraki successfully sought discretionary review of this determination, and the Court of Appeals, Division I, reversed. For purposes of its opinion, the court assumed that Rivas was “totally helpless” during the four-day period following the medical procedure. Id. at 924.² However, the court held that under its reading of RCW 4.16.190, this four-day period was not the type contemplated by the Legislature. Id. at 926-31 (majority opinion of Applewick, C.J., and concurring opinion of Agid, J.).

² Muraki appears to concede, for the purposes of argument, that Rivas was helpless for three days following her surgery. See Muraki Br. at 9, 15.

In particular, the majority opinion held that the reference in RCW 4.16.190 to “such incompetency or disability as determined according to chapter 11.88 RCW” foreclosed tolling for a four-day period of time. Rivas at 930. The court accepted Muraki’s argument that the guardianship statutes do not envision such a short-lived incapacity because RCW 11.88.010(1)(c) provides that “a finding of incapacity must be ‘based upon a demonstration of management insufficiencies *over time*,’ and that the time periods referenced in the guardianship statutes show that the phrase ‘over time’ was not intended to apply to short-term incapacity of only a few days.” Id. at 928-29 (quoting RCW 11.88.010(1)(c)). The majority opinion finds it significant that, while the guardianship statutes do not set forth a minimum duration for incapacity, they establish minimum procedural timelines for processing a guardianship petition well in excess of four days. Id. at 929-30. It concludes:

While we do not set a bright line rule for the minimum duration of incapacity to qualify for a guardian to be appointed, it is clear that under the guardianship statutes, a four-day incapacity would be insufficient to permit appointment of a guardian. As a matter of law, Rivas cannot meet her burden of proof that a guardianship would have been appropriate when her cause of action accrued.

Id. at 930; see also id. at 930-31 (Agid, J., concurring) (portraying the guardianship requirement of “management insufficiencies over time” as a “substantive” standard for tolling purposes).

Rivas petitioned this Court for review, urging that the Court of Appeals misconstrued RCW 4.16.190, and that its interpretation violates

both public policy and Rivas' due process rights. See Rivas Pet. for Rev. at 1-3.

This Court granted review.

III. ISSUE PRESENTED

What is the meaning and effect of the phrase "such incompetency or disability as determined according to chapter 11.88 RCW," in RCW 4.16.190, Washington's tolling statute?

IV. SUMMARY OF ARGUMENT

Washington's tolling statute, RCW 4.16.190, operates to suspend commencement of the applicable statute of limitations when a plaintiff is "incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings." Reasonably interpreted, the tolling statute's additional reference to "incompetency or disability as determined according to Ch. 11.88 RCW," does not require a plaintiff to prove he or she would qualify for appointment of a guardian under Ch. 11.88 RCW in order for the tolling statute to apply. The cross reference only incorporates those definitions in Ch. 11.88 RCW that bear directly on the meaning of "incompetent or disabled" in RCW 4.16.190. Those definitions are found in RCW 11.88.010.

The requirement in RCW 11.88.010(1)(c) that eligibility for a guardian requires proof of "management insufficiencies over time in the area of person or estate," is not a factor in determining incapacity and does not bear directly on the meaning of "incompetent or disabled" in the tolling statute. Instead, this "over time" requirement addresses concerns

unique to Ch. 11.88 RCW, identifying circumstances where an incapacity is deemed too short-lived to warrant imposing the strictures of a guardianship, with corresponding diminution of a ward's liberty interests. Importing the "over time" requirement to RCW 4.16.190 results in the strained consequence of rendering certain plaintiffs, otherwise incapacitated, ineligible for tolling without any conceivable justification for such a result.

This interpretation of the "over time" requirement is wholly consistent with this Court's teachings in Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989).

V. ARGUMENT

Introduction

Washington's tolling statute and guardianship scheme provide separate, yet complimentary protections to incompetent and disabled individuals. This Court discussed the interrelationship between the tolling and guardianship provisions in Young v. Key Pharmaceuticals, holding that commencement of a guardianship did not foreclose application of the tolling statute, RCW 4.16.190, to suspend the limitation period for a civil action due to disability. See 112 Wn.2d at 224.

Since then, new uncertainty has arisen regarding the interface of the tolling statute and guardianship laws, in light of the Legislature's 1990 amendments to the guardianship statutes. See 1990 Laws, Ch. 122 § 2 (amending RCW 11.88.010). Resolution of this issue requires

consideration of the letter, spirit and intent of the tolling statute and the statutory scheme governing guardianships.

A. Overview Of Washington Statutes Regarding Tolling Of Civil Action Limitation Periods And Appointment Of Guardians For Incapacitated Persons.

Re: Tolling of Civil Action Limitation Periods

In Washington, the Legislature has established various limitation periods for civil actions, defining how long a plaintiff has to bring an action in court on a particular claim. See generally Ch. 4.16 RCW.³ At the same time, the Legislature allows, in certain situations existing at the time a claim for relief accrues, the applicable limitation period to be tolled. See RCW 4.16.190. This accommodation serves to provide every person the full benefit of the governing limitations period. Cf. Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224-26, 86 P.3d 1166 (2004) (explaining how tolling operates to suspend the statute of limitations in certain instances). Tolling is authorized when the person is a minor, incompetent or disabled, or imprisoned pending sentencing. See RCW 4.16.190. Of particular interest here, is tolling of the limitation period for those persons:

incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW.

³ The statute of limitations applicable to Rivas' claim is RCW 4.16.350, which allows three years from the negligent act or omission to file a complaint for medical negligence.

RCW 4.16.190(1).⁴ This provision establishes two considerations for tolling. The first phrase, regarding a person's inability to understand the nature of the proceedings, is the easier to grasp and its meaning does not appear to be in dispute. The difficulty comes with interpreting the second phrase, and what is meant to be incorporated from Ch. 11.88 RCW.

The cross reference in RCW 4.16.190 to the guardianship scheme was added in 1977. See 1977 Laws, Ch. 80 § 2. Although the guardianship scheme is referenced by chapter, the context relates to the determination of incompetence or disability outlined in RCW 11.88.010. See Young v. Key Pharmaceuticals, 112 Wn.2d at 221.⁵ In Young, this Court interpreted RCW 4.16.190 as incorporating into the tolling statute only the *definitions* in RCW 11.88.010. See 112 Wn.2d at 221-22.

RCW 4.16.190 itself does not expressly impose any other requirements, except that the incapacity exist "at the time the cause of action accrued." If at that time, a person is unable to understand the

⁴ The full text of the current version of RCW 4.16.190 is reproduced in Appendix A to this brief. This statute was amended in 2006, but the amendment is not relevant to the issue presented in this case. See 2006 Laws, Ch. 8 § 303.

⁵ At the time this cross reference was first addressed in Young, RCW 11.88.010 did not include the "over time" language now found in RCW 11.88.010(1)(c). See 1984 Laws, Ch. 149 § 176. (The text of this version of RCW 11.88.010 is reproduced in Appendix B to this brief.) RCW 11.88.010 was amended in 1990 to include the "over time" language in sub-section (c). See 1990 Laws, Ch. 122 § 2. (The text of this version is reproduced in Appendix C to this brief.) The latest version of RCW 11.88.010 became effective in 2006, but this amendment does not affect this appeal. See 2005 Laws, Ch. 236 § 2. (The text of this version is reproduced in Appendix D to this brief.)

During the above time period, additional revisions were made to RCW 11.88.010, however the "over time" language relevant to this appeal has remained unchanged since it first appeared in 1990.

nature of the proceedings due to incapacity, tolling occurs. See id.⁶ Tolling continues until the incapacity is resolved, perhaps indefinitely. Young at 224 (accepting the possibility that a life-long incapacity may result in a tolling period of equal duration).

Re: Procedure for Appointment of Guardians

Washington guardianship law is governed by both Ch. 11.88 RCW and Ch. 11.92 RCW. The tolling statute, RCW 4.16.190, only cross references Ch. 11.88 RCW. The Legislature has provided no clear delineation regarding what aspects of guardianship law are covered by Ch. 11.88 RCW, as opposed to Ch. 11.92 RCW. For the purposes of this brief, it is enough to note that there is some overlap between these chapters, and that Ch. 11.92 RCW appears to focus on various duties of guardians, but it does not otherwise purport to define incompetency or disability, other than to declare a person is of full legal age when eighteen years old. See RCW 11.92.010. Chapter 11.88 RCW does address what constitutes incompetency or disability, although it speaks of these conditions in terms of “incapacity.” See e.g. RCW 11.88.010.

In 1990, Ch. 11.88 RCW underwent significant revisions in order to more fully safeguard the liberties that may be jeopardized or lost by imposition of a guardianship, such as the right to vote, marry, contract,

⁶ Muraki seems to argue, as an aside, that Rivas’ helpless condition after surgery is unrelated to the failure to commence the action within three years of the negligent act or omission. See Muraki Br. at 15; Muraki Ans. to Pet. for Rev. at 20. The plain language of RCW 4.16.190 only requires proof of entitlement to tolling. There is no need to establish a nexus between the incapacitating condition and belated filing.

buy or sell property, sue in an individual capacity, or consent to medical treatment. See 1990 Laws, Ch. 122 § 4 (amending RCW 11.88.030(3)(b)). These 1990 amendments stemmed from Substitute Senate Bill 6868. See S.S.B. 6868, 51st Leg., Reg. Sess., Senate Floor Notes & Report at 1 (Wash. 1990) (expressing need to prevent exploitation of incapacitated persons by restricting guardianships to “truly appropriate” situations, where “clearly warranted”).⁷ Extracts from the Senate Floor Notes and Report are reproduced in Appendix E to this brief. The Legislature’s intent to restrict the liberty of individuals “only to the minimum extent necessary” is reflected in these amendments. See 1990 Laws, Ch. 122 § 1 (amending RCW 11.88.005). Notably missing from the legislative history however, is any reference to tolling under RCW 4.16.190, or any indication that the enhanced guardianship protections were intended to impact entitlement to tolling. See S.S.B. 6868, Senate Report; S.S.B. 6868, 51st Leg., Reg. Sess., H.R. Report (Wash. 1990).

The 1990 amendments, for the first time, separated and defined two contexts in which an adult may be incapacitated and require a guardian - as to person and as to estate:

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

⁷ The legislative history for 1990 Substitute Senate Bill # 6868 is available at the Washington Archives, in Olympia. The legislative history contains various documents including Committee Reports and Floor Notes.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

RCW 11.88.010(1)(a),(b).⁸ Amidst these definitions of incapacity, RCW 11.88.010(1)(c) contains language yet to be interpreted by this Court. It provides:

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies *over time* in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

RCW 11.88.010(1)(c) (emphasis added).

It is this “over time” language that is the focus of this appeal. The question is whether this consideration is part of the substantive definition of incapacity under RCW 4.16.190, or more properly viewed as a separate legal requirement for establishing incapacity for guardianship purposes.

B. The Tolling Statute’s Cross Reference To Ch. 11.88 RCW Only Incorporates The Substantive Definitions For Incapacity, And Not The “Over Time” Requirement, Designed To Protect Against Imposing Guardianships On Persons With Only Short-Lived Incapacities.

Re: Statutory Construction

Evaluating the intersection of the tolling and guardianship provisions invites consideration of a host of statutory construction rules.⁹

⁸ A person is also incapacitated if a minor. See RCW 11.88.010(1)(d); see also RCW 26.28.010 (setting eighteen as the age of majority); RCW 11.92.010 (same).

⁹ The parties invoke various rules of statutory construction. See e.g. *Rivas Pet for Rev.* at 9 (statutes are to be read as a whole), at 16 (strained consequences should be avoided); *Muraki Br.* at 13 (plain reading rule), at 14 (common sense reading rule), at 17 (duty of court to carry out legislative intent), at 22 (courts should avoid strained results).

In the end, the key consideration here should be whether the interpretation adopted by the Court of Appeals below is flawed because it results in strained consequences. See Glaubach v. Regence Blueshield, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) (cautioning courts to avoid statutory interpretations that lead to “unlikely, absurd, or strained consequences”).

The tolling statute’s cross reference to Ch. 11.88 RCW suggests the statutes should be read harmoniously, to the extent possible. See State v. Elgin, 118 Wn.2d 551, 557, 825 P.2d 314 (1992) (recognizing statutes relating to same subject should be harmoniously construed to protect the integrity of both). Such a reading is not reasonably attainable here, if the spirit and intent of each statute is to be preserved. See id. at 555, 558 (placing the spirit and purpose of a statute above a strained interpretation of inartful language). Reading the “over time” requirement in RCW 11.88.010(1)(c) to limit the tolling protections of RCW 4.16.190, thereby denying the benefit of tolling to persons otherwise “incompetent or disabled,” creates a strained consequence. This reading leaves these plaintiffs in a strange place - “totally helpless,” yet not entitled to the full benefit of the limitation period. See Rivas, 134 Wn.App. at 924, 930.

This strained consequence is avoided if the guardianship processes are confined to the guardianship context. The tolling statute will apply to persons with legitimate, yet short-lived incapacities at the time a cause of action accrues. At the same time, the guardianship scheme will protect those who are subject to guardianship, when the incapacity is of sufficient

duration to warrant the strictures of a guardianship and the corresponding limitations on liberty interests.

Re: *Young v. Key Pharmaceuticals*

While this Court has not addressed the relationship between the tolling statute and guardianship scheme in precisely this context, the reading of these provisions in *Young v. Key Pharmaceuticals* supports preserving the distinct purpose and rights afforded by each. See 112 Wn.2d at 222-24. Despite subsequent changes to each statutory provision, the purpose of each has endured and the teachings of *Young* remain relevant.

Young involved an incapacitated minor and whether the appointment of a guardian ended the tolling period on a medical negligence claim. See 112 Wn.2d at 220-21. This Court held that RCW 4.16.190 tolled the statute of limitations for a legally incompetent person despite the appointment of a guardian under Ch. 11.88 RCW. See id. at 221.¹⁰ In reaching this conclusion, it interpreted the language, “such incompetency as determined according to chapter 11.88 RCW,” to incorporate only the definitions of the guardianship scheme. Id. at 222 (concluding RCW 4.16.190 incorporates the definitions in (former) RCW 11.88.010, and affirming Ch. 11.88 RCW provides “the source for the

¹⁰ Muraki distinguishes *Young* because a minor was involved, which triggers tolling under RCW 4.16.190 without consideration of Ch.11.88 RCW. See Muraki Ans. to Pet. for Rev. at 18. While minority is a separate basis for tolling, *Young* considered the *general* effect of a guardianship on tolling. In doing so, this Court evaluated how the laws interfaced, and interpreted the cross reference to Ch.11.88 RCW to incorporate substantive definitions, but nothing more. See *Young* at 220-21.

tolling statute's definitions"). In all other respects, the statutory provisions were viewed as operating independently of each other. See id. at 221-22. This construction, limiting the cross reference to definitions, should be read into the tolling statute as if it were part of the statute itself. See State v. Roggenkamp, 153 Wn.2d 614, 629-30, 106 P.3d 196 (2005) (confirming construction by the highest court operates as part of a statute when subsequent legislative amendments do not alter the construction).

Ultimately, the Young opinion also reflects a willingness to provide every eligible person the full benefit of the governing limitations period. The Court's acceptance of potentially indefinite tolling periods, in instances where a person is permanently incapacitated, underscores the importance placed upon this right. See Young at 224.

Re: Court of Appeals Opinion Below

The Court of Appeals majority opinion departs from the teachings of Young when it incorporates the guardianship *process* into the tolling statute, thus rendering tolling unavailable to certain otherwise incapacitated persons. See Rivas, 134 Wn.App. at 928. By outlining the length of time necessary for a guardian to be appointed, the court essentially prohibits any tolling for incapacities that endure for less than twenty-four days. See id. at 929-30. The majority opinion suggests a timeline requiring: 1) a minimum of three days for notice of hearing, reduced from the standard ten days notice, pursuant to RCW 11.88.040; and 2) twenty-one days for the incapacitated person to consult with a

lawyer, under RCW 11.88.045(1)(a). See id. at 929-30. These fundamental steps require at least twenty-four days, and effectively establish a “bright line” for the minimum duration of an incapacity, before a person is eligible for tolling under RCW 4.16.190.¹¹

The effect of imposing the procedural requirements for guardianships on tolling is to deprive injured persons with legitimate, but relatively short-lived incapacities, the full benefit of the limitation period. Under the Court of Appeals’ view, the four-day incapacity suffered by Rivas is insufficient to toll the limitations period. Id. at 930. This strained consequence highlights the unfairness that comes from imposing the guardianship requirements beyond their intended context. See Elgin, 118 Wn.2d at 555, 558 (discouraging interpretations that lead to strained consequences).

The sweeping incorporation of the guardianship procedures by the Court of Appeals misapprehends the primary teaching of Young, and improperly limits application of the tolling provision. When considering the impact of one statute’s incorporation of another, such as in RCW 4.16.190, Washington courts only incorporate the relevant portions of the referenced statute, based upon the textual context of the reference. See Int’l Export Corp. v. Clallam Co., 36 Wn.App. 56, 58, 671 P.2d 806

¹¹ In reality, appointing a guardian may take up to sixty days. As the Court of Appeals noted, additional requirements may increase the time involved. See Rivas at 930; see also RCW 11.88.030(5) (requiring petitions be heard within sixty days).

(refusing to incorporate part of a statute that did not relate to the referencing language), *review denied*, 100 Wn.2d 1039 (1984); see also 2B Norman J. Singer, Statutes and Statutory Construction, §§ 51.07-.08 at 269, 273-74 (6th ed. 2000) (explaining references to title, chapter, or section only incorporate the relevant portions of the legislation). Here, the procedural sections of the guardianship scheme are unrelated to the substantive determination of incapacity, and this Court has already rejected the notion that they are incorporated into the tolling statute. See Young at 221; text supra at 12-13.

The special concurrence below, by Judge Agid, suggests that the “over time” language imposes an additional *substantive* requirement on the determination of incapacity. Rivas at 930-31 (Agid, J., concurring). If correct, this interpretation would require incorporation of the “over time” criteria into the tolling analysis. See Young at 221. However, this is not the case. Sub-sections (a) and (b) of RCW 11.88.010 enumerate substantive factors bearing on the nature of incapacity. Sub-section (c) enumerates substantive factors as well, by its reference to “[a]ge, eccentricity, poverty, or medical diagnosis.” RCW 11.88.010(1)(c). Collectively, one or more of the factors in sub-sections (a), (b), and (c) may help guide the inquiry under the tolling statute, regarding whether the plaintiff can “understand the nature of the proceedings.” However, the same is not true of the “over time” requirement, which is a separate consideration for whether a guardianship is justified. The “over time”

criteria seems to presuppose that an incapacity otherwise exists. Id. Rather than being part of the substantive definition of incapacity, as Judge Agid suggests, the “over time” consideration addresses a related prudential concern regarding the appropriateness of a guardianship when the (otherwise established) incapacity is short-lived. See RCW 11.88.010(1)(c).

Re: Proposed Interpretation

Under the interpretation proposed in this brief, entitlement to tolling is determined as follows: Under RCW 4.16.190, the person must be unable to understand the nature of the proceedings at the time the cause of action accrued. The criteria for this determination includes the factors referenced in RCW 11.88.010(1)(a), the “demonstrated inability to adequately provide for nutrition, health, housing or physical safety,” and (b), the “inability to adequately manage property or financial affairs.” The four factors referenced in RCW 11.88.010(1)(c) may also be relevant – “[a]ge, eccentricity, poverty, or medical diagnosis.” The “over time” requirement, however, is unrelated to the application of the tolling statute, and should only be viewed as protecting against the appointment of guardians for short-lived incapacities.

This view of RCW 4.16.190’s incorporation of Ch. 11.88 RCW appears to be shared by Washington commentators Tegland and Ende, who explain:

It is doubtful that the legislature intended to require a formal determination of incapacity under RCWA 11.88 in

order to justify tolling. Presumably, the standards for incapacity found in the guardianship statutes are to be used as guides in determining whether a person seeking a toll could not ‘understand the nature of the proceedings’ within the meaning of RCWA 4.16.190.

15A Karl B. Tegland and Douglas J. Ende, Wash. Prac. § 4.5, at 79 (2007).¹²

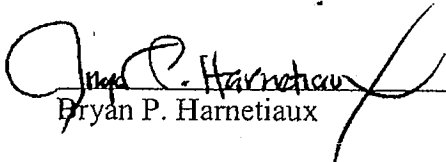
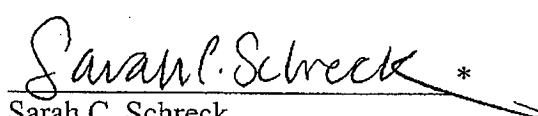
Guided by the principles of Young, this Court should limit the “over time” criteria in RCW 11.88.010(1)(c) to guardianship proceedings, as this requirement has no conceivable relevance to tolling. While guardianships require elaborate safeguards to preserve order and the liberty interests of wards, there are no equivalent risks involved with tolling. In fact, tolling serves as a separate and distinct protection of the rights of incapacitated persons. To preserve the spirit and intent of each construct, both must be limited to their respective spheres, except where expressly provided otherwise. As previously articulated in Young, Ch. 11.88 RCW is merely a source for substantive definitions, and nothing more.

¹² Rivas argues a number of different theories for why tolling is available under RCW 4.16.190 for the four days she was in intensive care. Compare Rivas Pet. for Rev. at 16 (arguing RCW 4.16.190 only engrafted the Ch.11.88. RCW guardianship procedures, not definitions of incapacity) with Rivas Br. at 18-19 (citing Tegland and Ende, supra, for view that Ch. 11.88 RCW definitions of incapacity should be used as guides in determining whether a person understands the nature of proceedings, for purposes of tolling under RCW 4.16.190); Rivas Pet. for Rev. at 12-13 (same); Rivas Supp. Br. at 12 (same). This latter argument is consistent with the view expressed in this amicus curiae brief. WSTLA Foundation disagrees with the suggestion that it has raised a new issue. See Muraki Ans. to WSTLA Foundation Amicus Curiae. Mem. at 2-3.

VI. CONCLUSION

The Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 13th day of December, 2007.

 * 
Bryan P. Harnetiaux Sarah C. Schreck

On Behalf of WSTLA Foundation

* Signed original retained by counsel; document transmitted for filing by email

APPENDIX

RCW 4.16.190

Statute tolled by personal disability.

(1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

[2006 c 8 § 303; 1993 c 232 § 1; 1977 ex.s. c 80 § 2; 1971 ex.s. c 292 § 74; Code 1881 § 37; 1877 p 9 § 38; 1869 p 10 § 38; 1861 p 61 § 1; 1854 p 364 § 11; RRS § 169.]

1984 Laws, Ch. 149 § 176

Sec. 176. Section 11.88.010, chapter 145, Laws of 1967 as last amended by section 2, chapter 309, Laws of 1977 ex. sess. And RCW 11.88.010 are each amended to read as follows:

(1) The superior court of each county shall have power to appoint guardians for the persons and estates or either thereof, of incompetent persons, and guardians for the estates of all such persons who are nonresidents of the state but who have property in such county needing care and attention.

An "incompetent" is any person who is either:

(a) Under the age of majority, as defined in RCW 11.92.010, or
(b) Incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of disabled-persons, who by reason of their disability- have need for protection and assistance, but who cannot be found to be fully incompetent, upon investigation as provided by RCW 11.88.090 as now or hereafter amended. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and disabilities on a disabled person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incompetent nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

For the purposes of chapters 11.88 and 11.92 RCW the term "disabled person" means an individual who is in need of protection and assistance by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, but cannot be found to be fully incompetent.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incompetent or disabled person is domiciled, or if such person is a resident of a state institution for developmentally disabled persons in either the county where in such institution is located, the county of domicile, or the county wherein a parent of the alleged incompetent or disabled person is domiciled.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its

appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

1990 Laws, Ch. 122 § 2

GUARDIANSHIPS

AN ACT Relating to guardianship; amending RCW 11.88.005, 11.88.010, 11.88.020, 11.88.030, 11.88.040, 11.88.045, 11.88.080, 11.88.090, 11.88.100, 11.88.105, 11.88.107, 11.88.120, 11.88.125, 11.88.130, 11.88.140, 11.88.150, 11.92.035, 11.92.040, 11.92.050, 11.92.053, 11.92.056, 11.92.060, 11.92.090, 11.92.100, 11.92.110, 11.92.115, 11.92.130, 11.92.140, 11.92.150, 11.92.160, 11.92.170, 11.92.180, and 11.92.185; adding new sections to chapter 11.88 RCW; adding new sections to chapter 11.92 RCW; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 2. Section 11.88.010, chapter 145, Laws of 1965 as last amended by section 176, chapter 149, Laws of 1984 and RCW 11.88.010 are each amended to read as follows:

(1) The superior court of each county shall have power to appoint guardians for the persons and /or estates, ~~or either thereof,~~ of incompetent incapacitated persons, and guardians for the estates of all such persons who are nonresidents of the state but who have property in such the county needing care and attention.

An "incompetent" is any person who is either:

(a) ~~Under the age of majority, as defined in RCW 11.92.010, or~~

(b) ~~Incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his property or caring for himself or both.~~

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW 26.28.010.

(e) For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any person who

is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

(f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of disabled-incapacitated persons, who by reason of their disability-incapacity have need for protection and assistance, but who cannot be found to be fully incompetent, upon investigation as provided by RCW 11.88.090 as now or hereafter amended- are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and disabilities restrictions on a disabled an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incompetent incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

For the purposes of chapters 11.88 and 11.92 RCW the term "disabled person" means an individual who is in need of protection and assistance by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, but cannot be found to be fully incompetent.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incompetent or disabled incapacitated person is domiciled, or if such person is a resident of a state institution for developmentally disabled persons resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county where in such institution the facility is located, the county of domicile prior to residence in the supported facility, or the county wherein where a parent or spouse of the alleged incompetent or disabled incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue

would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if ~~protective~~ guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) When a court imposes a full guardianship for an incapacitated person, the person shall be considered incompetent for purposes of rationally exercising the right to vote and shall lose the right to vote, unless the court specifically finds that the person is rationally capable of exercising the franchise. Imposition of a limited guardianship for an incapacitated person may result in the loss of the right to vote when in the courts discretion, the court determines that the person is incompetent for purposes of rationally exercising the franchise.

2005 Laws, Ch. 236 § 2

VOTERS AND VOTING--GUARDIAN AND WARD--VOTING RIGHTS

AN ACT Relating to the voting rights of persons under guardianship; amending RCW 11.88.010 and 11.88.010; creating a new section; providing an effective date; and providing an expiration date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 2. RCW 11.88.010 and 1991 c 289 s 1 are each amended to read as follows:

- (1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.
 - (a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.
 - (b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.
 - (c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.
 - (d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW 26.28.010.
 - (e) For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.
 - (f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter
- (2) The superior court for each county shall have power to appoint limited

guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incapacitated person is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse of the alleged incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) ~~When a court imposes a full guardianship for an incapacitated person, the person shall be considered incompetent for purposes of rationally exercising the right to vote and shall lose the right to vote, unless the court specifically finds that the person is rationally capable of exercising the franchise.~~ Imposition of a limited guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights.

Sec. 3. RCW 11.88.010 and 2004 c 267 s 139 are each amended to read as follows:

(1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(d) A person may also be determined incapacitated if he or she is under the age of majority as defined in RCW 26.28.010.

(e) For purposes of giving informed consent for health care pursuant to RCW 7.70.050 and 7.70.065, an "incompetent" person is any person who is (i) incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both, or (ii) incapacitated as defined in (a), (b), or (d) of this subsection.

(f) For purposes of the terms "incompetent," "disabled," or "not legally competent," as those terms are used in the Revised Code of Washington to apply to persons incapacitated under this chapter, those terms shall be interpreted to mean "incapacitated" persons for purposes of this chapter.

(2) The superior court for each county shall have power to appoint limited guardians for the persons and estates, or either thereof, of incapacitated persons, who by reason of their incapacity have need for protection and assistance, but who are capable of managing some of their personal and financial affairs. After considering all evidence presented as a result of such investigation, the court shall impose, by order, only such specific limitations and restrictions on an incapacitated person to be placed under a limited guardianship as the court finds necessary for such person's protection and assistance. A person shall not be presumed to be incapacitated nor shall a person lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court

order establishing such a limited guardianship. In addition, the court order shall state the period of time for which it shall be applicable.

(3) Venue for petitions for guardianship or limited guardianship shall lie in the county wherein the alleged incapacitated person is domiciled, or if such person resides in a facility supported in whole or in part by local, state, or federal funding sources, in either the county where the facility is located, the county of domicile prior to residence in the supported facility, or the county where a parent or spouse of the alleged incapacitated person is domiciled.

If the alleged incapacitated person's residency has changed within one year of the filing of the petition, any interested person may move for a change of venue for any proceedings seeking the appointment of a guardian or a limited guardian under this chapter to the county of the alleged incapacitated person's last place of residence of one year or more. The motion shall be granted when it appears to the court that such venue would be in the best interests of the alleged incapacitated person and would promote more complete consideration of all relevant matters.

(4) Under RCW 11.94.010, a principal may nominate, by a durable power of attorney, the guardian or limited guardian of his or her estate or person for consideration by the court if guardianship proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(5) When a court imposes a full guardianship for an incapacitated person, the person shall be considered incompetent for purposes of rationally exercising the right to vote and shall lose the right to vote, unless the court specifically finds that the person is rationally capable of exercising the franchise. Imposition of a limited guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor.

NEW SECTION. Sec. 4. Section 2 of this act expires January 1, 2006.

NEW SECTION. Sec. 5. Section 3 of this act takes effect January 1, 2006.

Approved April 28, 2005.

Effective July 24, 2005, except section 3 which is effective January 1, 2006.

SENATE BILL REPORT

ESSB 6868

BY Senate Committee on Children & Family Services (originally sponsored by Senators Stratton, Smith, Bailey, Vognild, Talmadge, Craswell, Owen, McMullen, Saling and West)

Modifying guardianship provisions regarding incapacitated persons.

Senate Committee on Children & Family Services

Senate Hearing Date(s): February 2, 1990

Majority Report: That Substitute Senate Bill No. 6868 be substituted therefor, and the substitute bill do pass.

Signed by Senators Smith, Chairman; Craswell, Vice Chairman; Bailey, Stratton, Vognild.

Senate Staff: Lidia Mori (786-7755)
March 3, 1990

House Committee on Judiciary

AS PASSED SENATE, FEBRUARY 9, 1990

BACKGROUND:

The Legislature enacted the guardianship statutes to protect people who have limited capabilities to govern their financial affairs or take care of themselves. It has come to light that many people for whom a guardianship has been performed have been financially exploited by their court appointed guardians. It is also believed that the existing laws do not restrict guardianships to situations where they are truly appropriate and do not contain enough standards and specificity to promote responsible and beneficial behavior on the part of those involved in the guardianship process.

SUMMARY:

Legislative intent emphasizes guardianships are utilized only when clearly warranted and are to be fashioned such that a person's liberty and autonomy are restricted to the minimum extent necessary.

The terms "incompetent" and "disabled" are replaced with "incapacitated" which is defined as having a significant risk of personal harm based upon a demonstrated inability to adequately

provide for nutrition, health, housing, or physical safety. A person is incapacitated as to estate when there is significant risk of financial harm based upon demonstrated inability to adequately manage property or financial affairs.

In the petition for guardianship or limited guardianship, an explanation must be included as to why no alternative to guardianship is appropriate. If the petitioner proposes a particular person to act as guardian ad litem there must be a description of the person's relationship to any of the parties and a statement as to why that person is suggested..

Notice that a guardianship proceeding has been commenced and a copy of the petition must be personally served on the alleged incapacitated person (AIP) not more than 15 days after the petition has been filed. The notice must contain a clear and easily readable statement of the legal rights which may be in jeopardy as well as notice that the AIP has a right to counsel and a jury trial.

The AIP must be present in court at the final hearing on the petition unless this is waived by the court for good cause other than mere inconvenience. The AIP has a right to counsel and the court will provide counsel at public expense if the AIP is unable to afford one or if the expense would result in a substantial hardship. If the AIP has no practical access to funds, the court will appoint counsel and has the discretion to impose a reimbursement requirement in the final order.

A report from a physician or a psychologist who has personally examined the AIP within the last 30 days must be provided to the court before a guardian or limited guardian may be appointed. The report is required to contain certain information in a specified format.

A registry of people who are willing and qualified to serve as guardians ad litem must be assembled by the superior court of each county by September 1, 1991. The court is directed to choose a guardian ad litem from this list except in extraordinary circumstances. In order to be eligible for this registry, a person must submit certain information and complete a training program approved by the court. A model guardian ad litem training program will be developed by an advisory group consisting of individuals and representatives from qualified and knowledgeable organizations. The required duties of the guardian ad litem are specified as well as the content of the written report which is to be filed within 20 days of appointment of the guardian ad litem and at least ten days before the hearing on the petition.

Within three months after appointment, the guardian or limited guardian must file an inventory of all of the property of the AIP and must annually file a verified account of the administration of the guardianship assets. The information which must be contained in the account is specified. The court in its discretion may allow the accountings at intervals of up to 36 months for estates having a value of not more than twice the homestead exemption;

exclusive of real property. Any substantial change in income or assets of the guardianship estate must be reported to the court within 30 days and a review hearing scheduled. The guardian or limited guardian must also file, within three months of appointment, a personal care plan for the AIP. The information which must be contained in the personal care plan is described. Guardians and limited guardians are not compensated at public expense.

A bank, trust company, savings and loan association or insurance company must forward a report to the court whenever it provides a guardian access to an asset of an AIP. The information which must be contained in the report is specified. Contents of a safety deposit box belonging to an AIP must be inventoried before it is released to the guardian and a copy of the inventory attached to the report to the court.

All children of the alleged incapacitated person who are not residing with a notified person must receive notice of the hearing for appointment of a guardian or limited guardian. They must also be sent a copy of the guardian ad litem report.

Appropriation: none

Revenue: none

Fiscal Note: available

Effective Date: July 1, 1991

Senate Committee - Testified: PRO: Evan Iverson; William C. Crowell, AARP; Dennis Mahar, WA Association of Area Agencies on Aging; Evan O. Thomas, WA State Bar Association; Ray May; Kren Thompson; WA State Bar Association; CON: Robert McKay, WA Association of Prosecuting Attorneys; Cynthia Hammer; Frank Winslow, Alzheimer Society of WA

HOUSE AMENDMENTS:

For the purpose of giving informed consent for health care, an "incompetent" person is a person who is incompetent due to mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, and unable to manage his or her property or provide personal care.

Notice that a guardianship proceeding has been commenced shall include a clear and easily readable statement written in capital letters, double-spaced and in a type size not smaller than ten-point type.

If a court determines that a person is incapacitated and that a guardian or limited guardian should be appointed, the court must also determine whether the incapacity is a result of a developmental disability and whether it can be expected to continue indefinitely.

If the court finds that a person is incapacitated as a result of a developmental disability that is expected to continue indefinitely and the person's estate has a value, exclusive of real property, of not more than twice the homestead exemption, the court may allow the guardian or limited guardian to file their reports at intervals of up to 36 months. The court may also waive or modify other reporting requirements that the court considers unduly burdensome or inapplicable.

When a court imposes a full guardianship for an incapacitated person, the person is considered incompetent for purposes of exercising the right to vote unless the court specifically finds that the person is rationally able to exercise the right to vote. An incapacitated person for whom a limited guardianship has been imposed may lose the right to vote if the court determines that the person is incompetent for purposes of exercising the right to vote. A guardian ad litem must provide the court with a written report which must include an evaluation of the incapacitated person's mental ability to rationally exercise the right to vote and the basis upon which the evaluation is made.

FLOOR NOTES

SSB 6868

MODIFYING GUARDIANSHIP PROVISIONS REGARDING INCAPACITATED PERSONS.

PRIME SPONSOR: SENATOR LOIS STRATTON

WHAT THE BILL DOES: REPLACES THE WORDS "INCOMPETENT" AND "DISABLED" WITH "INCAPACITATED" AND ATTEMPTS TO RESTRICT GUARDIANSHIPS ONLY TO APPROPRIATE SITUATIONS. THE SUPERIOR COURT OF EACH COUNTY IS DIRECTED TO ASSEMBLE, BY SEPTEMBER 1, 1991, A REGISTRY OF PEOPLE WHO ARE WILLING AND QUALIFIED TO SERVE AS GUARDIANS AD LITEM. A MODEL GUARDIAN AD LITEM TRAINING PROGRAM WILL BE DEVELOPED BY AN ADVISORY GROUP CONSISTING OF INDIVIDUALS AND REPRESENTATIVES FROM QUALIFIED AND KNOWLEDGEABLE ORGANIZATIONS. THE DUTIES OF GUARDIANS AD LITEM ARE DEFINED AS WELL AS THE DUTIES OF GUARDIANS AND LIMITED GUARDIANS. WITHIN THREE MONTHS AFTER APPOINTMENT, THE GUARDIAN OR LIMITED GUARDIAN MUST FILE AN INVENTORY OF ALL OF THE PROPERTY OF THE INCAPACITATED PERSON AND MUST ANNUALLY FILE AN ACCOUNT OF THE ADMINISTRATION OF THE ASSETS. ALSO, WITHIN THREE MONTHS, THE GUARDIAN OR LIMITED GUARDIAN MUST FILE A PERSONAL CARE PLAN FOR THE INCAPACITATED PERSON.

WHY IT IS NEEDED: MANY PEOPLE FOR WHOM A GUARDIANSHIP HAS BEEN PERFORMED HAVE BEEN FINANCIALLY EXPLOITED. ALSO, EXISTING LAWS DO NOT RESTRICT GUARDIANSHIPS TO SITUATIONS WHERE THEY ARE TRULY APPROPRIATE. IN THE CURRENT LAW THERE ARE NOT ENOUGH STANDARDS AND SPECIFICITY TO PROMOTE RESPONSIBLE BEHAVIOR ON THE PART OF THOSE

INVOLVED IN A GUARDIANSHIP PROCESS.

FISCAL IMPLICATIONS OF THE BILL: THE LOCAL FISCAL NOTE INDICATES THAT THERE COULD BE A "SLIGHTLY NEGATIVE FISCAL IMPACT ON LOCAL GOVERNMENTS" DUE TO THE EXPANDED DUTIES OF THE GUARDIANS AD LITEM AND THE REQUIREMENT THAT A TRAINED REGISTRY OF GUARDIANS AD LITEM MUST BE ASSEMBLED. THIS COULD BE OFFSET BY THE PRESUMPTION THAT FEWER GUARDIANSHIPS WILL BE FILED DUE TO THE STRICTER STANDARDS INCLUDED IN THE BILL AS WELL AS MORE STREAMLINED PROCEDURES.

PERSONS WHO SPOKE FOR AND AGAINST THE BILL: PRO: EVAN IVERSON, SENIOR LOBBY; WILLIAM CROWELL, AARP; DENNIS MAHAR, WA ASSOC. OF AREA AGENCIES ON AGING; EVAN O. THOMAS, WA STATE BAR ASSOC; RAY MAY; KAREN THOMPSON, WA STATE BAR ASSOC; CON: ROBERT MCKAY, WA ASSOC. OF PROSECUTING ATTORNEYS; CYNTHIA HAMMER; FRANK WINSLOW, ALZHEIMER SOCIETY OF WA.

COMMENTS: THE BAR ASSOCIATION WOULD LIKE TO SEE AN AMENDMENT INCORPORATING A ONE YEAR DELAY DATE INTO THE BILL. THE ASSOCIATION OF COUNTIES AND THE BAR ASSOCIATION HAVE ALSO AGREED ON TWO PROPOSED AMENDMENTS TO CURTAIL THE FISCAL IMPACT ON THE COUNTIES.